Opinion

JOHN M. WALKER, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Peter L. Truebner, Assistant United States Attorney, of Counsel), *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

This is an appeal from an order of the District Court for the Southern District of New York denying, without an evidentiary hearing, Kapatos' third petition under 28 U.S.C. § 2255[1] to vacate his conviction, after trial before Judge Weinfeld and a jury in October 1966, for stealing an interstate shipment of jewelry on November 8, 1963.

The jewelry was in a station wagon bearing six messengers employed by AAA Jewelry Service—Moots, Figueroa, Kreisman, White, Tretter and Savoca. The station wagon was overtaken by a black sedan bearing two men dressed in police uniforms. One, allegedly Kapatos, directed Moots, the driver, to pull over and, on the latter's doing so, drew a pistol and said "Get out. This is a hold-up." Two more men, carrying pistols and wearing masks, positioned themselves on either side of the station wagon. As the six AAA employees emerged, they were ushered into a panel truck driven by a fifth man and were shackled and handcuffed by the two masked men. The black sedan followed the truck. With the bad luck that happily so often attends such ventures, the "policemen" were unable to

[1] We affirmed without opinion Judge Weinfeld's denial of the first petition, which raised a point different from that here at issue; certiorari was denied, 393 U.S. 852 (1968). Denial of the second petition rested on a technical ground which the third petition cured.

drive the station wagon because it had a standard gear shift which they did not know how to operate. One of them, a man who was between five feet ten and six feet in height, weighed between 180 and 200 pounds, and had a red crop of hair, approached Mullett, an iron-worker foreman who was working nearby, and asked whether he knew how to drive a standard shift car. Mullett answered affirmatively and went to the car, but on observing its contents and hearing a shouted warning from his fellow workers, he decided to have no part of the job.

The only substantial issue at Kapatos' trial was identification. The Government presented no other evidence connecting him wtih the crime, he did not take the stand, and the defense offered no alibi. With varying degrees of certainty, Kreisman, Figueroa, White and Moots made in-court identifications of Kapatos as one of the two men who had approached the station wagon. Thes were bolstered by reference to out-of-court identifications made by Kreisman, Figueroa, and White approximately two years after the robbery. Tretter and Savoca said they would not be able to identify the robbers if they saw them again. Mullett, two other iron-workers and a sidewalk frankfurter vendor testified that Kapatos was not the "policeman" who had solicited Mullett's aid, and a nearby shop-keeper testified he was not the man who had hurriedly bought a jacket some six hours later. The Government explained this testimony by asserting that Kapatos, who apparently bore no resemblance to Mullett's description, was the other "policeman."

The defense naturally attacked the identifications. It brought out that shortly after the robbery a New York City policeman had accumulated photographs of various suspects, including Kapatos; that he had handed these to one Orbach, an officer of AAA, with the request that Orbach

display them to the six messengers and that he made no arrests as a result. On its own examination of Kreisman, who made the most positive identification, the Government elicited that his first sight of Kapatos after the robbery was in November 1965 when two FBI agents took him to view Kapatos on Delancey Street underneath the Williamsburgh Bridge where Kapatos was working. Figueroa who, viewing Kapatos in court, could say only that Kapatos looked like the man who approached the AAA car, stated that in November 1965 two F.B.I. agents took him and Moots "to recognize" Kapatos and that he then thought Kapatos "was very much alike to that man who stop us." Moots was somewhat less sure. White thought Kapatos looked "very much like" the man who had approached the car. The Government brought out that in December 1965, F.B.I. agents had taken White to view Kapatos in front of a restaurant, and he had then made an identification. Cross-examination of Mullett disclosed that the F.B.I. had shown him a photograph of Kapatos, had taken him down to the north side of the Williamsburgh Bridge where Kapatos was working, and had asked him whether Kapatos "was the fellow who couldn't drive the stick shift." As indicated, Mullett's answer was negative. Practically the sole issue for the jury was the credibility of the identification testimony; the prosecutor said in summation that if the jurors didn't believe Kreisman, they should not convict.

An appeal was taken to this court. A principal point in appellant's brief was that "The prior show-up suggestive identification procedure under the circumstances was a flagrant violation of the 'due process of law' clause of the Fifth Amendment to the U. S. Constitution." The brief vigorously contended that the one-to-one exhibition of Kapatos to Kreisman, Figueroa, Moots and White was unduly suggestive and cited Mullett's testimony to support

this claim. The error was said to be "much more flagrant" than in *Wade* v. *United States*, 358 F.2d 557 (5 Cir. 1966), which then had not yet been reviewed by the Supreme Court. We affirmed without opinion.

A petition for certiorari was filed prior to the Supreme Court's decisions of June 12, 1967 in the *Wade-Gilbert-Stovall* trilogy, 388 U.S. 218, 263, 293, but the Government's memorandum and petitioner's reply brief were filed thereafter, and the latter made extensive reference to those cases. The brief supporting the petition argued, as had the brief in our court, that the identification procedures, especially the show-up of Kapatos to Kreisman under the Williamsburgh Bridge, were impermissibly suggestive and cited the lower court decisions in *Wade*, *Gilbert* and *Stovall*. The Court denied certiorai on October 9, 1967, 389 U.S. 836.

The instant petition under 28 U.S.C. § 2255 was founded on three affidavits, one by Isidore Zimmerman, an investigator employed by Kapatos' counsel, another by Mullett, and a third by Theodore Rosenberg, co-counsel at Kapatos' trial and his counsel in this proceeding.[2] All that Mullett's affidavit added to his trial testimony was that when he was taken to the construction site under the Williamsburgh Bridge, the agents told him not simply that he was to look at a suspect, which was surely inferable from his testimony, but that they thought they had "a very good suspect," who would be pulling up in a car they described, and also that there was an attempted voice identification—all, as stated,

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[2] Rosenberg stated that Lopez, the other trial counsel, told him that prior to the trial Lopez was standing with Kapatos in front of a courtroom in the Federal Courthouse when the courtroom door opened and a Federal agent led the Government witnesses past them. This episode, which of course was well known to defendant and his counsel, had been brought out at the trial, and is not of sufficient significance to require further discussion.

unsuccessful. After interviewing Mullett, Zimmerman went to AAA's office, where he encountered Orlach, Moots and Figueroa. The two later reminded Zimmerman that they did not positively identify Kapatos. When Zimmerman asked whether they were influenced in any way by the F.B.I. in the identification on Delancey Street, Orlach refused to let them answer but they allegedly said, "I did not identify the defendant at Delancey Street." Zimmerman was unable to locate Figueroa afterwards, and White refused to give any information without clearance from the F.B.I. and the United States Attorney. Although he promised to call Zimmerman after receiving such clearance, he never did; whether he ever called the F.B.I. or the United States Attorney, we do not know. A visit by Zimmerman to Moots' home was unproductive. Kreisman also declined to answer the investigator's questions. Judge Weinfeld denied the petition without an evidentiary hearing, and this appeal followed.

In *Sanders* v. *United States*, 373 U.S. 1 (1963), the Supreme Court, dealing with the provision of § 2255 that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," held that this should not be read so as to apply a res judicata standard to successive applications by federal prisoners. Rather the provision "is to be deemed the material equivalent of § 2244" (dealing with successive habeas corpus petitions by state prisoners), 373 U.S. at 14. In either case, the denial of a prior petition may serve as the basis for refusing a hearing on a later petition only if three conditions are met: (1) the ground urged in both applications must be the same (2) it must have been determined adversely to the applicant on the merits on the prior petition; and (3) reaching the merits on the sub-

sequent application would not serve the ends of justice, 373 U.S. 15.

Six years later in *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1969), the Court indicated that the *Sanders* criteria would govern a § 2255 petition setting forth claims which had earlier been urged and determined adversely to the petitioner at the trial and appellate levels. In that case the claim had been raised and ruled against at trial and, although counsel elected not to press it on appeal, Kaufman himself had brought it to the attention of the appellate court, which, however, did not mention the point in its opinion.[3] See 394 U.S. at 220 n. 3. Mr. Justice Brennan disposed of the "bald statement, variously expressed, that a motion under § 2255 cannot be used in lieu of an appeal" on the basis that this did not apply to constitutional claims, 394 U.S. at 222-23. However, he qualified this by saying that "[W]here a trial or appellate court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a § 2255 hearing," by referring to the *Sanders* criteria, and by adding that "where the trial or appellate court has had a 'say' on a federal prisoner's claim, it may be open to the §2255 court to determine that on the basis of the motion, files, and records, 'the prisoner is entitled to no relief.'" 394 U.S. at 227 n. 8. Both in the footnote and at 394 U.S. 230-21, he cited with approval Judge J. Skelly Wright's dissent in *Thornton* v. *United States*, 368 F.2d 822, 831 (D.C. Cir. 1966). There, after a somewhat similar statement, Judge Wright posed four cases that in his view would require § 2255 relief despite a previous opportunity to

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[3] A note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1064-66 (1970), suggests that this uncertainty whether the court of appeals considered Kaufman's claim is the reason why the Supreme Court allowed relitigation.

ventilate or even actual ventilation of a constitutional claim. These were: (1) where a federal trial or appellate court said nothing because the issue was not raised; (2) where it was unclear whether the 'say' was on the merits; (3) where new law had been made or facts uncovered relating to the constitutional claim since the trial and appeal; and (4) where the trial or appellate court based its rulings on findings of fact made after a hearing that was not full and fair.

Kapatos' case does not fall under any of these rubrics. The issue of impermissibly suggestive identification was clearly raised in the briefs to this court, and our negative 'say', even though not expressed in an opinion, must have been on the merits. The hearing at Kapatos' trial was full and fair. Kapatos concedes that the principles first enunciated in *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263, do not apply to his case. He does assert, however, that the opinion in *Stovall* v. *Denno*, 388 U.S. 293, "advanced an innovated concept regarding a due process violation with respect to a pretrial identification procedure." But the *Stovall* opinion does not read as if the Court thought it was making new law in holding that an impermissibly suggestive identification violated due process. It referred to this as "a recognized ground of attack upon a conviction independent of any right to counsel claim," 388 U.S. at 302, citing *Palmer* v. *Peyton*, 359 F.2d 199 (4 Cir. 1966), and indicated that for that very reason state convictions already final were still subject to attack by federal habeas on that basis although not for violation of the newly announced line-up rules.

We are thus left only with the asserted discovery of new evidence relating to the constitutional claim. If the petition had alleged any new evidence that would have significantly buttressed the claim of impermissibly suggestive identifica-

tion, and if this was not discoverable before the trial in the exercise of reasonable diligence, we would indeed direct a hearing; a conviction resting solely on identifications alleged to have been impermissibly suggestive ranks high on the list where re-examination on collateral attack is warranted if a sufficient basis is shown. *Cf. United States v. Miller*, 411 F.2d 825 (2 Cir. 1969). But the petition here did not measure up to that standard. While it added some details as to F.B.I. conduct with respect to Mullett, these could readily have been developed on cross-examination at the trial and, in light of Mullett's trial testimony that Kapatos was not the man who approached him, no harm was done in any event. What we are asked to conclude is that the likelihood of the agents' having made the same kind of remarks to Kreisman and the other three identification witnesses is sufficient to call for a hearing. But even if a hearing were to show that similar remarks were made, which is sheer speculation, this would have added little to what the jury already knew about the suggestive nature of the pre-trial identifications, and the whole subject of what the agents said to the four witnesses at their respective pre-trial confrontations with Kapatos could readily have been developed.[4] We read the remark allegedly made by Figueroa and Moots to Zimmerman as saying only that they had been no more positive on Delancey Street than they were in court—not that they were recanting testimony they had given. Here again the whole matter of their prior identifications was on the record and could have been explored at trial if defense counsel had so chosen. In sum, the petition leaves us with no more belief than was entertained by the able and conscientious district judge that a

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[4] Since the Government had brought out the prior one-to-one identifications, the defense had nothing to lose by probing into the circumstances.

hearing would add anything of significance to what was or could have been developed at the trial over which he had presided.

We thus find no mandate in *Kaufman* for allowing further litigation of the very claim of impermissibly suggestive identification that was decided against Kapatos when, some months after *Stovall*, the Supreme Court declined to review our affirmance of his conviction. Cf. *Slawek* v. *United States*, 413 F.2d 957, 959 (8 Cir. 1969) (Blackmun, *J.*); Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1064-66 & n. 144 (1970).

Affirmed.

Excerpts from Testimony of Trial Record

Kreismann

(Tr. 65) * * *

Q. Did you and your fellow co-workers from the Triple A ever come to court around August of this year in connection with this particular case? A. In court?

Q. Yes, in court, on the 13th floor or on the 11th floor? A. Oh, yes.

Q. You did? At that particular time did you ever see the defendant, Kapatos, in the hallway? A. Yes, I did.

On direct

(Tr. 37) * * *

Q. Now, I direct your attention to November of last year, 1965, and I ask you whether you saw this man here you've just identified? A. Yes, sir.

Mr. Lopez: Objection, your Honor.

The Court: Overruled.

Q. Can you tell us the circumstances in which you saw him? A. Yes.

Mr. Lopez: Your Honor, may I have a continuing objection as to all this testimony to prior identification?

The Court: Yes.

Q. Let me ask you this: Where did you see him, Mr. Kapatos? A. I saw him on Delancey Street, underneath the Williamsburgh Bridge.

Q. And was this in the day time or in the evening? A. In the day time.

(Tr. 38)

Q. Were you in anybody's company at that time? A. Yes, sir, I was.

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* Reference to pagination of Transcript of Trial Record.

Excerpts from Testimony of Trial Record

Q. Who might they be? A. Two F.B.I. agents.

Q. Is it true, Mr. Kreisman, that they asked you to look at this man?

Mr. Lopez: Objection, your Honor, leading.

The Court: Objection sustained.

Q. What did you do, Mr. Kreisman? What happened? A. What happened? The F.B.I. parked the car there and they told——

Mr. Lopez: Objection.

The Court: Objection sustained, not what they told him.

Q. Did there come a time when you did see him in the company of two F.B.I. agents? A. Repeat the question.

Q. Did there come a time that day when you saw the defendant when you were in the company of two F.B.I. agents? A. Yes.

(Tr. 38-39)

A. Yes.

Q. When you saw him, did you tell the F.B.I. agents that that was the man who was wearing the policeman's uniform, who got out of the car, who stuck you up on November 8, 1963? A. Yes, I did.

Prosecutor's Summation

(Tr. 427).

If you don't believe Kreisman, then I don't think you should convict.

Figueroa (Tr. 115)

Q. Did you see the one driving? A. No, because he was covering him with his body.

(Tr. 119)

Q. Now, I direct your attention to November of last

year, 1963. Did you have occasion to see this man who you've just identified then; did you see him then? A. Yes.

Q. Was anybody with you when you saw him at that time? A. Louis Moots.

Q. Was there anybody else? A. Two agents of the F.B.I.

Q. Did you tell the agents of the F.B.I. anything when you saw this man?

Mr. Lopez: Objection.

The Court: Objection sustained.

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The Court: Objection sustained. Subsequent to November 8, 1963, did you see this man on any other occasion?

The Witness: After 1963 I don't think I saw him, but I only want to clarify.

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(Tr. 120)

The day that they took me to recognize him, I can, only say that the day they took me to recognize him it seems to me that he was very much like to that man who stop us.

Mr. Lopez: I move to strike out all of his testimony as to the identity of this particular defendant, your Honor.

The Court: Objection overruled.

Q. This man that you have identified here in court today, you say that you saw him at a time after the robbery when you were with the F.B.I. agents? A. Yes, I saw him.

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(Tr. 121) Cross

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Excerpts from Testimony of Trial Record

Q. Now, Mr. Figueroa, when you were asked by Mr. Gold if you could identify any person in this particular courtroom as one of the persons who were involved in holding up the AAA Jewelry station wagon in which you were a passenger, you said that you saw a person that appeared to be, is that correct, appeared to be one of the perpetrators, is that true? A. Yes.

Q. But you were not positive, is that also correct?

(Tr. 122) • • •

Q. I ask you yes or no, are you positive that that man, Kapatos, as he sits there, is the man you saw in the policeman's uniform? A. I can only say that he looked like exactly that man.

Q. So that you can't say positively he is the man, is that right? A. I can't tell you 100 per cent, but many people look like other people and I saw him only that one day.'

(Tr. 142)

"Now, I recall exactly. The same day they took us to Delancey Street, before, before leaving Precinct."

JOHN WHITE—Direct.

(Tr. 152)

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Q. Now, I want you to stand up, Mr. White, and I want you to take a slow and careful look around this courtroom and I ask you whether you see anybody here today whom you recognize as a participant in the robbery that took place on November 8, 1963? A. I see a man who looks similar to the policeman. • • •

(Tr. 153-54)

Q. Now, this man who you've just looked at in this courtroom today, did there come a time after this robbery when you saw this man again? A. Yes.

(Tr. 154) • • •

Q. When was that? A. I was asked——

Q. I just asked you when? A. It was sometime in the winter, approximately around, I imagine, December.

Excerpts from Testimony of Trial Record

The Court: December of what year are you referring to?

The Witness: 1965.

Q. Were you in the company of F.B.I. agents at that time? A. Yes, I was.

Q. Did you recall the location? A. The location?

Q. Where you saw this man? A. It was somewhere on the West Side. I remember the name of the restaurant that he was in front of. It was the Homestead, if I am not mistaken.

Q. Did you identify him at that time? A. Yes, sir.

Mr. Lopez: Objection, your Honor.

Mr. Gold: I don't see how I could possibly get this out. I have tried all the words I know.

Q. Did you recognize this man when you looked at him? (Tr. 155) A. Yes, I did. I looked at him and he fit the description of the policeman.

Q. The description that was in your mind? A. Yes, in my mind.

The Court: The policeman you saw on November 8, 1963?

The Witness: Yes.

* * * * *

(Tr. 160) Cross

* * * * *

Q. Now, as you sit there and ask you stand in this courtroom, are you positive that the defendant Kapatos is the one that was dressed in the policeman's uniform on November 8, 1963? Can you say "I am positively sure"? A. I can't say that.

Excerpts from Testimony of Trial Record

(Tr. 49) KREISMAN—Cross

Q. Did McGerald also show you some photographs? A. I believe he did, yes.

Q. On any occasion? A. I am not altogether clear on who particularly showed me photographs, but I was shown quite a few photographs.

Q. Quite a few? A. Right.

Q. Of all those particular photographs, were you ever able to identify any particular persons as one of the assailants that stopped the vehicle and robbed it? A. From the Police Department, no.

Tr. p. 311—Orbach Cross

In respect to photos shown to the victim of the crime, the Court questioned Orbach at page 311:

> "The Court: Do I understand your testimony that they were shown repeatedly to each individual messenger?
>
> The Witness: Yes, as much as I recollect."

Direct for Defendant—Tr. pp. 365, 367

Detective James Francis McGerald testified as follows:

> "Q. Did you ever show them photographs of suspects or people that they could possibly identify? A. Yes, I did.
>
> Q. At the 14th Squad, did you show them photographs? A. I did.
>
> Q. Did you show them photographs at any other place? A. After the first two weeks, photos were sent in to me from different departments, New Jersey, Westchester County, and from the different squads in our department, and I would go to 103 Nassau Street, the office of AAA, and there present them to Larry Orbach, because the messengers were

always en route. I would give them the photos and two or three days later or sometimes the same day I would go back and he gave me a negative answers.

Mr. Lopez: Mr. Kapatos, please stand.

Q. I ask you to look at this man named Kapatos and ask you if you at any time ever showed the messengers of the AAA Jewelry Service any photographs of this man? A. I did.

Q. Would you tell us the circumstances under which you showed it to them? A. As a result of a telephone call from the borough office Manhattan Borough office, under Assistant Chief Herring, the clerical man told me that Lieutenant Sullivan assigned, I believe, to the Manhattan Homicide Squad, had two suspects. He gave me the name of Donahue and Kapatos.

Q. As a result of that, did you receive photos of Kapatos and Donahue? A. The clerical man told me he would send them to the 14th Squad. As a result I got the photos and I then turned around and went back to Larry Orbach, owner of the AAA. I left the photos there and I returned a little later, the same day or a few days later, and he told me——

Mr. Gold: Objection to what Orbach said.

The Court: Yes.

Q. As a result of that conversation with Larry Orbach, did you make an arrest in this particular case? A. I did not.

Q. As a result of that particular conversation with Larry Orbach, was Kapatos a suspect in this particular case so far as you were concerned? A. No."

Verified Statement of Isidore Zimmerman, Investigator

State of New York,
County of Kings, ss.:

ISIDORE ZIMMERMAN, being duly sworn, deposes and says:

That he is an investigator employed by Theodore Rosenberg, Esq., of 133 Schermerhorn Street, Brooklyn, New York, assigned to interview Louis Moots, Victor Figueroa, John White, Max Kreisman and James R. Mullett, in connection with the particulars surrounding a pre-trial identification procedure in the case of *United States* v. *Thomas Kapatos*.

That on July 7, 1969, your deponent interviewed James R. Mullet, Business Agent, Structural Iron Workers, Local 40, with an office at the Broadway Central Hotel, 673 Broadway, New York, N. Y.

That on July 18, 1969, your deponent visited the office of the A.A.A. Jewelry Messenger Service, 93 Nassau Street, New York, N. Y., and encountered Mr. Larry Orbach, Louis Moots and Victor Figueroa.

The interview with Louis Moots and Victor Figueroa on this date proved that we cannot get any cooperation from Larry Orbach or the other two aforenamed persons, who work for him.

Mr. Orbach did not allow Mr. Moots and/or Mr. Figueroa to be questioned and would not allow a written, signed statement to be made.

Both Figueroa and Moots claim, on the identification theory, they did not positively identify Kapatos but said, "It looks like him". Deponent inquired as to whether they were influenced in any way by the F.B.I. on the identification when they were taken to Delancey Street to view Kapatos, from a distance. Mr. Orbach refused to let them answer. However, both witnesses blurted out, "I did not identify the defendant at Delancey Street'.

Later, they claimed the only thing the F.B.I. had told them, when they were picked up at their 45th Street office,

was, "We have a suspect we would like you to identify". Pressed on that point, they insisted that was all the F.B.I. told them.

At the time of the identification on Delancey Street, Mr. Orbach was physically present.

(It may be a good idea to subpoena these people.)

Orbach also refused to give or disclose Kreisman's address. However, he did say Kreisman does not work for him any more.

On July 28, 1969, deponent went to the last known address of Victor Figueroa at 1694 Lexington Avenue, New York, N. Y. and after a diligent search of the area was not able to contact Mr. Figueroa. Information from the superintendent of that building was that Mr. Figueroa had moved to an unknown address in New Jersey.

On July 30, 1969, deponent visited the home of John White, 283 Macon Street, Brooklyn, New York, and Mr. White told your deponent that he would not answer any questions or give any information until he cleared it with the F.B.I. and the United States Assistant Attorney, Mr. Gold. Mr. White promised to call your deponent at the office of Theodore Rosenberg, Esq., when he would receive such clearance. To date, Mr. White has not contacted your deponent.

On August 7, 1969, deponent visited the home of Louis Moots, in Richfield, New Jersey. Mr. Moots refused to make any statement to deponent.

On August 12, 1969, deponent went to the home of Max Kreisman, 2609 Hubbard Street, Brooklyn, New York, identified himself as an investigator for Theodore Rosenberg, Esq., and explained that he wanted a statement as to what transpired at the time of the pre-trial identification at the construction site where Thomas Kapatos was employed on

Verified Statement of Isidore Zimmerman, Investigator

November 18, 1965, on Delancey Street, New York, N. Y. Mr. Kreisman stated that he would not answer any questions.

Respectfully submitted,

(Sgd) ISIDORE ZIMMERMAN
5200 39th Avenue
Long Island City, N.Y.C.

Sworn to before me this
8th day of January, 1970.

.....
Notary Public

Verified Statement of J. Raymond Mullett, Witness

My name is JAMES RAYMOND MULLETT. I am a Business Agent of the Structural Iron Workers, Local 40, located at the Broadway Central Hotel, 673 Broadway, New York City. I live at 1785 East 34th Street; telephone number 336-5271.

I make this statement of my own volition.

I believe, sometime in November of 1965, some F.B.I. Agents called me at my office, asked me if I would be available to look at a suspect. A couple of days later, two or three Agents met me at my office; we went down to a car they had parked downstairs. They explained to me they wanted me to look at a suspect as he arrived at work at a construction site under the Williamsburg Bridge at Delancey Street, N.Y.C.

After I got into the car, I was informed we had some time to waste as the suspect was driving in from New Jersey.

We drove down to a coffee shop in the area of Water and Wall Streets and over a cup of coffee we chatted for about 15 minutes. During this conversation, one of the agents, his first name was Joe, second name unknown to me, said, "We have a very good suspect". At the end of this conversation it was suggested we had better get over to the job site. When we got into the car, word came over the radio that the suspect had come through the Lincoln Tunnel and was driving to his job.

They dropped me off at the job site. They went up a block and parked their car. They had explained to me that the suspect would be pulling up in what I believe was a light green Pontiac. I could be wrong as to the color and name of the car, however, they did describe it to me. They further told me where he would park the car and the entrance he would use to get to the job site.

In just about a minute, the car that was described to me by the F.B.I. Agents pulled up and parked; a man whom I later found out was Kapatos got out of the car

and as I observed him walk to the job site, passing within 25 feet of me, and entered the job site. I then turned and walked West in the direction of the Agents' car, was met by one of the Agents who asked me, if that was the man I had seen in the robbery, I replied: "No".

I then proceeded with this Agent up to their automobile; we got into the car and again was asked if this was the man and again I replied: "No". As we were talking, Kapatos pulled up abreast of us in his car, which was previously described, and started talking to the Agents and they in turn with him. It was a meaningless conversation; I think mostly to let me hear his voice. The Agents asked me if I recognized his voice. I said, "That the man who spoke to me at the robbery site spoke like a New Yorker and this man had the accent of a Jerseysite". They kept abreast of Kapatos' car going West on Houston Street. They kept the conversation going and again asked me, "Are you sure this isn't the voice you heard?" Again I replied, "No". Kapatos turned North on 6th Avenue. We followed until Kapatos parked at a gas station across the street from the Homestead Restaurant at 16th Street and 10th or 11th Avenue.

We kept going and they brought me back to my office.

The only names I knew of the F.B.I. Agents were "Joe" and "Bob".

I have read pages one to five (handwritten copy) and this is a true account of the day the F.B.I. Agents brought me down in an attempt to identify Thomas Kapatos.

I can't remember the exact date.

JAMES R. MULLETT

Sworn to before me this
..... day of January, 1970.

.....
Notary Public